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No. 791

In the Supreme Court of the United States

October Term, 1966

HARRY WALLERSTEIN, RECEIVER OF TELEVISION COMPANY OF AMERICA, INC., ALEX GOLD, and ROBERT W. HUGHES,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITION FOR REHEARING

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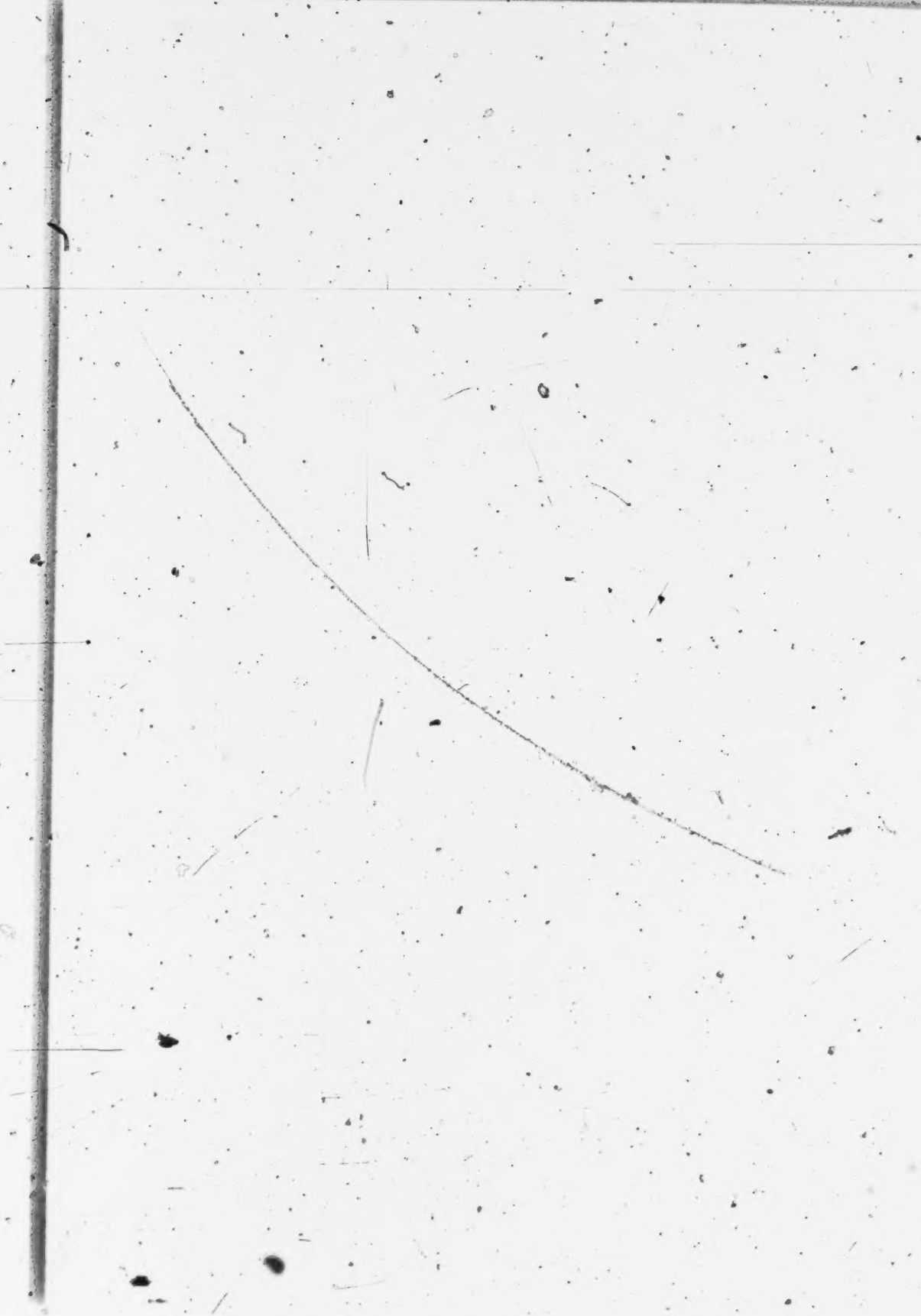

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Petitioners request for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District Court of Columbia Circuit was denied on February 13, 1964.

Pursuant to Rule 58, S.C.R. petitioners respectfully request the Court to reconsider its Order and grant Certiorari in this matter. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

GROUNDS FOR REHEARING

1. The Federal Communications Commission ("Commission") in enunciating a new policy in February of 1966, relative to the renewal of broadcast licenses of court appointed receivers under the Bankruptcy Act, set forth new law which constitutes intervening circumstances of substantial effect whereby certiorari should be granted. This policy affirms the very acts the receiver has attempted to accomplish in the above matter which the Commission has refused to grant.

2. The Commission in refusing to renew the license of Receiver Wallerstein is acting grossly unfair and is discriminating in its treatment of court appointed receivers under the Bankruptcy Act.

STATEMENT

The Commission has interpreted that its function is to renew broadcast licenses of court appointed receivers under the Bankruptcy Act, notwithstanding that prior license holders or officers of licensee holders may have been guilty of violations of the Commission's rules and regulations. This policy was enunciated in *Arthur A. Cirilli, Trustee in Bankruptcy,* 2 F.C.C. 2nd 973. The facts of that case are similar to this one in that the Commission granted an involuntary assignment of license in both instances to the Trustees in Bankruptcy. However, in the *Cirilli* case, the prior licensees' sole stockholder was sentenced to a one year probation in the United States District Court after pleading guilty to an indictment supporting sixteen counts of mail fraud and five

counts of radio fraud in violation of Section 1341 and 1343 Title 18, U.S. Code. The question then arose in the *Cirilli* case whether or not a hearing into the past conduct of the stockholder would be relevant to determine whether a renewal of the trustee's license should be granted. The Commission determined that since the stockholder was no longer associated with the station; and in fact, the station was being operated by a receiver pursuant to the Bankruptcy Act, that no useful purpose would be served in holding a hearing relative to the broadcast qualifications of the prior licensee.

In the instant case, the Commission did precisely what it said no useful purpose would be accomplished in doing, i.e. holding a hearing to determine the broadcast qualifications of a former licensee.

On the 1st day of May, 1961, Television Company of America, Inc. ("TCA") filed its petition for reorganization under Chapter XI of the Bankruptcy Act. It's petition provided that it would act as a debtor in possession. The Bankruptcy Court appointed Harry Wallerstein Receiver on November 16, 1961.

Wallerstein, from his appointment to the present time, has operated KSHO-TV in the public interest. There is no claim by the Commission that Receiver Wallerstein in five and one-half years has not operated KSHO-TV in the public interest. The Arrangement approved by the creditors of TCA and the Bankruptcy Court provided the following:

1. 25% payment in cash or 50% payment in stock of all general creditors.
2. Payment in cash to the following creditors

upon transfer of license from receiver to proposed licensee.

(a) Prior owners of KSHO TV	$140,000.00
(b) KBLI, Inc.	53,000.00
(c) Public stockholders of ultimate licensee corporation (either the return of their investment plus interest or continued stock ownership, at the election of each stockholder)	
Approximately	42,750.00

None of the persons receiving the amounts above designated were involved in the violations of the Commission's rules with the exception of the officers of KBLI, Inc. The Commission found that there was a willful concealment of ownership in Nevada Broadcasters Fund, Inc., ("Fund") by KBLI, Inc. (JA 274). KBLI, Inc. is a public corporation with approximately 1200 shareholders who purchased approximately $650,000 worth of stock while the officers of KBLI owned, through a corporation they controlled, 35,000 shares of KBLI, Inc. stock, par value $1.00 per share. The officers of KBLI, Inc. owned 6,250 shares of stock in the Fund which constitutes a minority interest, and they voluntarily agreed after the hearing before the Commission to give up their stockholdings in the Fund (J.A. 149).

ARGUMENT

The Commission in *Arthur A. Cirilli, Trustee in Bankruptcy* (WIGL) Superior, Wis., 2 FCC 2nd 692, on February 23, 1966, enunciated the new rule set forth

below after observing that applications involved in bankruptcy had caused "no little concern." The Commission stated in *Twelve Seventy, Inc.*, 2 F.C.C. 2nd 973, that it had recently had occasion to consider the problem of renewal of a receiver's license and its subsequent transfer in the *Cirilli* application. The licensee in that application had been guilty of misconduct reflecting adversly on his character qualifications; he was adjudicated a bankrupt after the filing of an application for renewal of license and the trustee in bankruptcy desired to dispose of the stock so that the proceeds of the sale could be disbursed to creditors. The Commission then referred to its opinion in *Arthur A. Cirilli, Trustee in Bankruptcy*, 2 F.C.C. 2nd 692, as follows:

> ". . . this is not a case in which a licensee who is guilty of misuse of a license or other misconduct attempts to transfer the license to avoid the consequence of his action. No special interest would be served by hearing on the qualifications of Haig (former licensee) on his right to a renewal of license. In reaching this conclusion, we do not intend, thereby, to abandon the Commission's basic policy that consent to an assignment or a transfer of control of a licensee is contingent upon a finding that the licensee is qualified to receive a renewal. However, where the licensee is in the hands of a trustee in bankruptcy, and is already in the process of liquidation, strict enforcement of the policy will not serve the public interest."

The Commission proceeded, in *Twelve Seventy, Inc.*, 2 F.C.C. 2nd 973, to attempt to distinguish its action and conclusion as not being inconsistent with its action in this case, *Television Company of America, Inc.*, 1 F.C.C. 2nd 91, 5 Pike and Fisher R.R. 2nd 811

where it denied the request for renewal of license by Receiver Wallerstein. The Commission, after first stating the receiver was innocent of any wrong doing, stated much of the misconduct complained about occurred after the appointment of Wallerstein and resulted from the continued association of some of the wrongdoers with the affairs of the station. "Moreover, the receiver proposed a transfer back to the corporate licensee which was still controlled by the individuals who had committed numerous acts of misconduct in their improper dealings with the Commission."

The Commission's statement that "much of the misconduct occurred after the appointment of the receiver and resulted from the continued association of some of the wrongdoers with the affairs of the station" is an absolute false statement of the facts of this case.

The Commission is correct that the receiver proposed to transfer back to the corporate licensee whose shareholders had been found by the Commission to have committed numerous acts of misconduct. However, under the proposed Arrangement as approved by the Bankruptcy Court, the only shareholders of the proposed licensee corporation who were still shareholders and who had been guilty of any wrongdoing were the officers of KBLI, Inc., namely, Howard D. Johnson, Gage R. Anderson and L. John Miner who jointly owned 6,250 shares of the stock (JA 129).

The Commission's statement in *Twelve Seventy, Inc.*, 2 F.C.C. 2d 973 (page 977), that these individuals still controlled the corporation is a gross misstatement of fact. Their stock ownership was approximately five per cent and they voluntarily offered to relinquish their

stockholdings. (J.A. 147.) In any event, their total stockholdings were de minimus.

The Commission went on to note in the *Twelve Seventy* case that the ultimate transferee to whom Wallenstine proposed to assign the license may have been innocent of any misconduct, but manifestly there did not exist the complete disassociation of the guilty parties from the operation and control of KSHO-TV. Again this is a shocking misstatement and conclusion in light of the actual fact that the proposed transferee would comprise of innocent stockholders and the transfer would accomplish the very thing which the Commission directed in *Twelve Seventy, Inc.*, 2 F.C.C. 2nd 973, and *Athur A. Cirilli, Trustee in Bankruptcy*, 2 F.C.C. 2nd 692.

CONCLUSION

Even-handed justice requires that petitioners be treated the same as other licensees and parties with similar facts, and that a Writ of Certiorari should be granted in this matter.

Respectfully submitted,

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